No. 3077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,
Appellant,

vs.

R. M. SIMS, Trustee in Bankruptcy of The Realty Union, a Corporation, Bankrupt,
Appellee.

OPENING BRIEF FOR APPELLANT

W. F. SULLIVAN,
C. A. S. FROST,
WM. M. AYDELOTTE,
Attorneys for Appellant.

Filed this.....day of February, 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The Mysell-Rollins Bank Note Co.

No. 3077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,
Appellant,

vs.

R. M. SIMS, Trustee in Bankruptcy of The Realty Union, a Corporation, Bankrupt,
Appellee.

OPENING BRIEF FOR APPELLANT

Statement of the Case

This is an appeal from the order of the District Court of the United States for the Northern District of California, made and entered on the 4th day of August, 1917, affirming the order of the Referee in Bankruptcy, sitting in San Francisco, California, previously made, disallowing appellant's claim to a vendor's lien on certain real property hereinafter described.

Although there was a vast deal of irrelevant and immaterial testimony taken at the hearing in this matter before the Referee in Bankruptcy and a considerable reiteration of question and answer to and from the several witnesses called, which, be-

cause of counsel for respondent's request that all of the testimony be printed *verbatim,* has resulted in a bulky transcript of the record, the essential facts of the case are simple and may be stated in few words.

On or about June 6, 1912, an agreement of sale of real property was consummated between the appellant herein and The Realty Union, the corporation bankrupt herein, wherein and whereby appellant herein conveyed by good and sufficient grant, bargain and sale deeds to the said Realty Union, the following described pieces of real property, bounded and described as follows:

All that lot of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

Beginning at a point on the eastern line of Telegraph Avenue, as the same now exists, distant thereon northerly one hundred (100) feet from the point of intersection thereof with the northern line of 45th Street, formerly Linden Lane; running thence northerly along said line of Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches, more or less, to the northern line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north 84 degrees 15 minutes east one hundred and twenty-five (125) feet; thence south 12 degrees 30 minutes west [8] par-

allel with Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches to a point on said line distant one hundred (100) feet northerly from the northern line of 45th Street; and thence south 84 degrees 15 minutes west one hundred and twenty-five (125) feet to the point of beginning.

Being a portion of Plot No. 35, as per Kellersberger's Map of the Ranchos of V. & D. Peralta on file in the office of the County Recorder of Alameda County.

* * * * * * * * *

All that lot of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

Beginning at the point of intersection of the northern line of 45th Street, formerly called Linden Lane, with the eastern line of Telegraph Avenue, as said street and avenue now exist; running thence easterly along said line of 45th Street one hundred and twenty-five (125) feet; thence north 12 degrees 30 minutes east one hundred (100) feet; thence south 84 degrees 15 minutes west one hundred and twenty-five (125) feet to the eastern line of Telegraph Avenue; and thence southerly along said last-named line one hundred (100) feet, more or less, to the point of beginning.

Being a portion of Plot No. 35, as per Kellersberger's Map of the Ranchos of V. & D. Peralta, on file in the office of the County Recorder of Alameda County.

* * * * * * * * *

The consideration for this sale of these pieces of property was the sum of $35,255.00, payable as follows, viz.: $729.36 payable in cash. $15,495.64 tax liens, mortgages and other incumbrances on the property assumed and paid by the said Realty Union, and two promissory notes, each dated June 12, 1912, made by the said Realty Union in favor of the said Hattie Hardesty Chapman, payable ten years after date in Gold Coin, one in the sum of Ten Thousand Dollars, and the other in the sum of Nine Thousand Dollars, and each bearing interest from date until paid at the rate of six per cent per year, payable monthly.

The deal was finally closed and all the consideration paid on June 13, 1913.

(See Transcript, p. 49—Letter of Roosevelt Johnson, Manager and Vice President of Realty Union to Hattie Hardesty Chapman.)

These two promissory notes called by The Realty Union witnesses "Investment Certificates," are set out *verbatim* in Transcript, pp. 26-27.

The fact that The Realty Union witnesses and its counsel persist in calling these notes investment certificates does not, of course, alter their character as promissory notes.

The Realty Union paid the interest on these two promissory notes up to March 6, 1915, but has never paid any part of the principal and has paid no part of the interest due on said notes since that time.

On the 10th day of May, 1915, this appellant commenced an action in the Superior Court of the State of California, in the County of Alameda, against the said Realty Union, alleging its bankruptcy, to enforce her vendor's lien upon the property herein above described which was still in the possession of The Realty Union and always had been in the possession of The Realty Union as the legal holder and owner thereof since its conveyance to it by appellant herein. The Realty Union had, since such conveyance, mortgaged the property to the Hibernia Savings and Loan Society, but such mortgage transaction has no relevancy to this case.

Before this action could be brought to trial, The Realty Union was, on the 15th day of September, 1915, adjudicated a bankrupt, and R. M. Sims, defendant and respondent herein, was appointed Trustee in Bankruptcy of said Realty Union.

Subsequently, the said Sims petitioned the Court sitting in Bankruptcy for an order of sale of the

real property of the said Realty Union, including the property in question here, and the complaint of appellant filed in the above-named Superior Court was presented in the Bankruptcy matter in opposition to such petition, and by stipulation of the parties was made the basis of a claim for a vendor's lien and a preferred claim on the property in question in the said Bankruptcy matter. (Transcript, p. 47.)

After taking testimony and hearing argument of counsel, the Referee in Bankruptcy made a report disallowing appellant's claim of vendor's lien. (Transcript, pp. 194-218.)

This report was, on exceptions heard in the said District Court, affirmed.

Specification of Errors

Now comes Hattie Hardesty Chapman, plaintiff and claimant in the above-entitled cause and proceeding, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and decree of said District Court, made and entered August 4th, 1917, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "I" of the Petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions of said Hattie Hardesty Chapman to said Referee's report, as specified and contained in said paragraph numbered "I."

2. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "II" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "II."

3. In holding that the evidence adduced before the Referee herein is sufficient to justify the findings of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph [193] numbered "III" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee dis-

allowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "III."

4. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "IV" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "IV."

5. In holding that the evidence adduced before the referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "VI" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "VI."

6. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evi-

dence is alleged to be insufficient to justify said finding as specified in paragraph numbered "VII" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said referee's report as specified and contained in said paragraph numbered "VII."

7. That said District Court erred in holding that said Hattie Hardesty Chapman is estopped from claiming that she has a vendor's [194] lien upon the property, or upon any of the property mentioned in her complaint herein.

8. That said District Court erred in holding that said Hattie Hardesty Chapman waived her vendor's lien upon said real property.

9. That said District Court erred in concluding that the plan and arrangement whereby said Investment Certificates were issued was inconsistent with the retention by said Hattie Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred to said corporation at the time said Investment Certificates mentioned in said complaint were issued to said Hattie Hardesty Chapman.

10. That said District Court erred in holding that said Hattie Hardesty Chapman is not entitled to a vendor's lien, and that she has no vendor's lien,

upon said real property; and in holding that said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever.

11. That said District Court erred in holding that the prayer of plaintiff's complaint (the complaint herein of said Hattie Hardesty Chapman), be denied.

12. That said District Court erred in giving and making said order and decree August 4th, 1917, in that said order and decree is against law.

ARGUMENT

Appellant's claim of vendor's lien is based primarily on Section 3046 of the Civil Code of California, which reads as follows:

> "Lien of Seller of Real Property. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

This section of our State Code is simply declaratory of what has been the law, as administered in equity, for many years.

> "Where a vendor delivers possession of an estate to a purchaser without receiving the purchase money, equity, whether the estate be or be not conveyed, and, although there was not any special agreement for that purpose, and whether the whole or only part of the money is unpaid, gives the vendor a lien on the land for the money."
>
> Sugden, Vendors and Purchasers, 8th Am. (Perkins) Edn., 1873, Vol. 2, p. 371.

Although we have set out herein all the Specifications of Error assigned by appellant (Transcript, pp. 248-251), we rely chiefly upon the following as specially calling the attention of this Court to the errors committed in the Court below, viz.:

7. That said District Court erred in holding that said Hattie Hardesty Chapman is estopped from claiming that she has a vendor's [194] lien upon the property, or upon any of the property mentioned in her complaint herein.

8. That said District Court erred in holding that said Hattie Hardesty Chapman waived her vendor's lien upon said real property.

9. That said District Court erred in concluding that the plan and arrangement whereby said Investment Certificates were issued was inconsistent with the retention by said Hattie Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred to said corporation at the time

said Investment Certificates mentioned in said complaint were issued to said Hattie Hardesty Chapman.

10. That said District Court erred in holding that said Hattie Hardesty Chapman is not entitled to a vendor's lien, and that she has no vendor's lien, upon said real property; and in holding that said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever.

11. That said District Court erred in holding that the prayer of plaintiff's complaint (the complaint herein of said Hattie Hardesty Chapman) be denied.

12. That said District Court erred in giving and making said order and decree August 4th, 1917, in that said order and decree is against law.

These specifications are found on pp. 250-251 of Transcript.

Appellant's claim of vendor's lien is resisted by the Trustee on three grounds:

First, because the property was not conveyed to the Bankrupt by the petitioner.

Second, because security was taken for the payment of the purchase price; and

Third, because there was an *implied* waiver of lien.

The learned Judge of the District Court in his Opinion and Order affirming the Order of the Referee and disallowing appellant's claim of vendor's lien, holds that neither of the first two objections is well taken, citing the cases of *Loomis* vs. *Davenport and St. P. R. Co.,* 17 Fed. Rep. 301, and *Brisco* vs. *Mirah Consol. Min. Co.,* 82 Fed. Dep. 952, in support of his position, respectively, in the matter of these two objections. (Transcript, pp. 242-245.)

We most respectfully assent to and are satisfied with the learned Judge's Opinion on these two points but urge, most respectfully, that the learned Judge erred in holding that:

> "The assertion of a vendor's lien in this case is utterly inconsistent with the purposes for which the property was conveyed. The holders of all certificates were contributors to a common fund to be used and managed for the common benefit of all, and persons who contributed real property in consideration of the receipt of such certificates occupy no more favorable positions in equity than those who contributed cash.
>
> To allow the assertion of the lien here would destroy all equality between different investors, and would be inequitable in the extreme, especially in view of the fact that the moneys received from other investors have no doubt been used to discharge the numerous liens existing against the property at the time the conveyance was made." (Transcript, pp. 246-247.)

In support of our contention that the Court below erred in drawing the above inference and conclusion from the evidence adduced in this case before the Referee in Bankruptcy and from the implication of law and fact to be drawn therefrom, we submit:

First: The testimony of appellant clearly shows that she considered the two promissory notes, or investment certificates, simply as the evidence of the Realty Union's indebtedness to her in the transaction in question; that she expected them to be paid in full with interest as agreed; that she had no intention of waiving any of her rights, and that she knew nothing of the general nature of the business of The Realty Union; or supposed, for a moment, that by accepting these "investment certificates" she embarked in any speculative scheme of The Realty Union.

In this behalf we quote from appellant's testimony (Transcript, pp. 66-68), cross-examination by Mr. Clark:

> "Q. You understood that. So far as the Realty Union was concerned, and what they stated they would be willing to do, was not the proposition from the very outset that they would be willing to do, was not the proposition from the very outset that they would satisfy your demand to the extent of $19,000 altogether with certificates, investment certificates?

A. What did those certificates mean to me? They meant only that they were going to pay me so much money, didn't they? What did I want of their little certificates? They [52] didn't mean anything to me except that they promised to pay me so much. It was $19,000. I didn't care about their little certificates. I only wanted their money. That is the way I had of their putting it down, to show me when they would pay it. So I took their certificates. Otherwise they would not appeal to me. Would they appeal to you? I didn't want to frame them.

Q. At that time they might have appealed to me.

A. They didn't to me.

Q. What I mean is this: They never at any time said to you that they would pay you $19,000 in cash and assume this mortgage?

A. They certainly did. Mr. Roosevelt Johnson said they would pay me $19,000 at the end of ten years, and he issued those ten-year certificates bearing six per cent interest every month.

Q. Did he state that this, however, would be paid only in investment certificates? Didn't he say that?

A. No, he told me he would pay me in hard cash. He didn't say anything about investment certificates.

Q. Did he state that so far as the company was concerned, that the only way in which the company could satisfy this demand at the present time was by giving investment certificates?

A. He said he could not pay me the money now, but he would give me these papers, or whatever you call them, and he would give me my money at the end of ten years.

Q. Had you not at that time heard of any other people having bought these investment certificates?

Mr. Aydelotte: We object to that question as incompetent, irrelevant and immaterial.

The Referee: The objection is overruled. (Question read.) A. No.

Mr. Clark: Q. Had you never heard in your life, prior to the time of receiving these investment certificates, of any other human being [53] who had received any of them?

A. I didn't know of a soul that had ever had one of those investment certificates, or those notes."

Further along in the same cross-examination (Transcript, p. 737) appellant testified:

"Q. Then when you took these certificates you understood that you were looking to the company generally, for the payment of the money, and not looking to any particular piece of real property as security for the payment of the money? Isn't that the fact?

A. When I took their notes I understood that they were going to pay me in a certain time, and I didn't think about—I thought they were good people and that they would pay me. I didn't think just about a particular piece of property, but I thought that they were all right."

The fact that appellant did not know that she had a vendor's lien—that she was ignorant of the existence of such a right in law or equity cannot militate against her. On the contrary the Court should infer that her very ignorance in the matter is a strong circumstance against a waiver.

Appellant could not expressly waive a right of whose existence she was ignorant, and the legal implication of such waiver can be based only on the clearest evidence of her acceptance of security or other means of payment.

> "The burden of proof is upon the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. (Citation.) And so long as the debt exists Courts will not presume that the lien has been waived, except upon clear and convincing testimony. (*Selna* vs. *Selna,* 125 Cal., pp. 357, 362.)

In a very recent case in the Supreme Court of the State of California, viz., *Braun* vs. *Kahn* (Vol. 54, California Decisions, p. 341 (Sept. 18, 1917), also reported in 167 Pacific Reporter, p. 869), an action to enforce a vendor's lien, the facts were that plaintiff sold defendant certain real property, being paid partly in cash and partly with a promissory note of defendant. Note being unpaid, plaintiff subsequently brought an action on the note without alleging the existence of his vendor's lien and took a

default judgment against defendant. Upon this judgment execution was issued and levied upon the property sold by plaintiff to defendant. No further action was taken looking to a sale on the levy. Subsequently the plaintiff brought an action, claiming a vendor's lien. Defendant defended on the ground that plaintiff had waived his vendor's lien by his failure to claim same in his previous suit. In the course of its opinion upholding the vendor's lien, the Court, by Mr. Justice Shaw, all other Justices concurring, says:

> "In the case of *Selna* vs. *Selna, supra,* the question before the Court was as to whether the filing and allowance of a creditor's claim against the estate of the vendee without including the claim or statement of an existing vendor's lien, which creditor's claim became by its approval in the nature of a judgment against the estate of the decedent vendee, was not sufficient in itself to amount to a waiver of the vendor's lien. In that case the Court, in deciding in favor of the persistence of the vendor's lien, and in declaring the ruling of the Court in *Fitzell* vs. *Leaky* to be *dicta,* goes on to say: 'It is stated by the authorities that if the vendor recovers a judgment at law and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money,' citing *Walker* vs. *Sedgwick,* 8 Cal. 398-404, and Overton on Liens, 691. [5] The true doctrine as outlined by these authorities in this State, and as fully sustained by the great weight of authority in other states, would seem to be that in order to constitute a waiver of a vendor's lien there must be some act or

> omission on the part of the vendor inconsistent with his assertion of the lien and evincing his intention to waive it, and that it must be such an act or omission as would render it inequitable to thereafter attempt to assert it; [6] and it has accordingly been held quite uniformly that in order that a personal judgment obtained by the vendor for the unpaid portion of the purchase price of the property may be held to operate as a waiver of the vendor's lien thereon, it must be affirmatively shown by the defendant resisting the lien that the vendee has property to which the lien of the judgment can attach or upon which the execution may be levied and which might thus serve as security for the debt. (*Zeigler* vs. *Valley Coal Co.*, 150 Mich. 82; *Roberts* vs. *Bruce*, 91 Ky. 379; *Dowdy* vs. *Black*, 50 Ark. 211, 6 S. W. 897; *Borror* vs. *Carrier*, 34 Ind. App. 367.)"

In the case of *Finnell* vs. *Finnell*, 156 Cal. 589, Finnell, the father, bought a large tract of land from his son, and after making payments of cash and of personal property, etc., there remained a balance on the purchase price of $92,000, for which Finnell, the elder, gave his son his promissory note, dated October 15, 1890, which by its terms was payable *ten years later*, or October 15, 1900. The opinion states the facts in the case with reference to the contentions of the defendant that the whole matter was a family settlement, the facts in relation to the organization of the Finnell Land Company, a corporation, and also the dealing with the Bank to which Finnell, the elder, was indebted in large sums of money, etc. The action was brought by the son

on October 14, 1904, or *fourteen years after the execution of the note,* and but one day prior to the barring of such an action by the Statute of Limitations, to enforce a vendor's lien upon the land which he had sold to his father, and which the father subsequently had transferred to the corporation whose shares went to the Bank, etc., as set out in the opinion. Every conceivable defense was made to the action, such as family settlement, transfer of the property to the corporation, a claimed innocent purchaser, laches, vendor's ignorance of his right to lien, etc., but the trial Court found in favor of the plaintiff and declared the vendor's lien good and ordered the property sold.

On appeal to the State Supreme Court from the judgment and from an order refusing a new trial, Mr. Justice Angelotti uses this language:

> "Unless plaintiff waived his rights in that behalf, he acquired *at the time of this sale* to his father a vendor's lien on the property so conveyed by him, for so much of the price as remained unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien was valid against every one claiming under the buyer except a purchaser or encumbrancer in good faith and for value. (Civ. Code, secs. 3046, 3048.) Whatever may be said against the policy of allowing such a secret lien, not evidenced by any writing or public record, our legislature has seen fit to look with favor upon it and to continue in force the old equity rules in regard thereto. As was said in *Fisher* vs. *Shropshire*,

147 U. S. 133, 143 (13 Supt. Ct. 201), the principle on which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. Our law, recognizing this as a just principle, gives to every vendor, in the vendor's lien declared by section 3046, security for and a means of enforcing payment of the consideration, so far as it can do so without injury to the rights of *bona fide* purchasers or encumbrancers for value.

* * * * * * * *

But the lien is presumed to exist and is an incident of the transaction of sale in all cases unless the intention of the vender that it SHALL NOT EXIST *be clearly manifested by his acts or declarations, and the burden of proof is on the vendee or his successors to show such intention.*

* * * * * * * *

The act manifesting an intention must be one substantially inconsistent with the continued existence of the lien and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance.

* * * * * * * *

The question in this connection is not what were the secret thoughts or expectations of plaintiff as to where he was to get this purchase money, but whether he HAD DONE ANY ACT OR MADE ANY STATEMENT THAT MANIFESTED HIS INTENTION TO ABANDON ANY RIGHT GIVEN HIM BY LAW to enforce his claim against the land, and to look solely to his father personally for pay-

ment, in other words, had he done or said anything that was inconsistent with the retention of a lien and amounted to a waiver thereof. As was said in *Moshier* vs. *Meek,* 80 Ill. 79, speaking of such a lien, this lien, in equity, is created without the express agreement of the parties, AND EVEN WHEN THEY DO NOT KNOW THAT SUCH A LIEN EXISTS OR IS CREATED BY OPERATION OF LAW.

* * * * * * * *

But the absence of knowledge that the law gives him such a security, or a mere secret intention not to claim it, does not affect the right.

* * * * * * * *

The trial Court found against appellant's claim that plaintiff had been guilty of laches in failing to assert his lien and bring an action to enforce the same prior to October 14, 1904, the date of the commencement of this action. We cannot hold that this finding is not sufficiently sustained by the evidence. The right of a vendor to enforce his lien continues, unless waived, so long as an action can be commenced for the purchase money (2 Jones on Liens, sec. 1064), and where a note for the purchase money is given, payable at a future day, an action to enforce the lien may be commenced at any time before the lapse of the period within which an action can be brought on the note.

* * * * * * * *

The sum and substance of this (testimony) was that plaintiff did not know that there was such a thing as a vendor's lien at the time of the conveyance to his father or until shortly before the commencement of this proceeding.

> We have already seen that the mere fact that a vendor does not know that the law gives him such security cannot affect his right. But it is urged that the proposed evidence was 'very material additional evidence upon the question of the intent of Williamson Finnell in taking the ninety-two thousand dollar note from his father, to the effect that he RELIED ENTIRELY upon the financial responsibility of his father as security for it, and that the reconveyance WAS IN FACT A FAMILY SETTLEMENT AND COMPROMISE,' and that it went to show that no vendor's lien was ever created.
>
> * * * * * * * *
>
> The LAW, not any contract of the parties, gave him the lien if the transfer of the land to his father was an ordinary sale, and we do not think that the proposed evidence as to his ignorance of the law relative to a vendor's lien was such as to throw any light upon the question whether it was a sale, or upon the question whether he did or said anything which might tend to show an understanding between the parties for a waiver of any right given him by the law."

Second: The statement in the opinion of the Court below that the assertion of a vendor's lien in this case is utterly inconsistent with the purpose for which the property was conveyed; that the holders of all certificates were contributors to a common fund to be used and managed for the common benefit of all and that persons who contributed real property in consideration of the receipt of such certificates occupy no more favorable positions in equity

than those who contribute cash, is, we submit, an erroneous inference and conclusion from the evidence adduced in this case.

Besides the testimony of appellant herein, some of which has been quoted above, the testimony of Mr. Aydelotte, witness for appellant (Transcript, pp. 102 to 107) and the testimony of Mr. Roosevelt Johnson, Vice-President and Manager of The Realty Union (Transcript, pp. 125 to 133), shows conclusively that appellant was at all times insisting upon her legal rights to payment of the balance of the purchase price of the real property conveyed by her to The Realty Union.

Instead of the inference that appellant was a contributor to a common fund to be used and managed for the common benefit of all purchasers of the investment certificates of The Realty Union, the irresistible inference to be drawn from the facts in this case is that appellant was not making an investment in the certificates of The Realty Union, but was selling it a certain piece of real property for a certain price payable about one-half in money and one-half in promissory notes. She was not an investor in the company's business, as would be a person who purchased shares of stock in a corporation.

If appellant is to be charged with knowledge of the general business purposes of The Realty Union (although, we submit, there is no evidence of this),

also must all other vendors of property to The Realty Union, and all purchasers for cash of the investment certificates of The Realty Union, be similarly charged. In other words, such other vendors of real property to The Realty Union, and investors in the certificates of The Realty Union, must be charged with knowledge that vendors of real property to The Realty Union are not paid cash in full for such property and so are entitled to the vendor's lien given them by law and such other vendors and investors must necessarily make their sales and investments subject to such knowledge.

The further statement in the opinion of the Court below that the "assertion of the lien here would destroy all equality between the different investors and would be inequitable in the extreme, *especially in view of the fact that the moneys received from other investors have no doubt been used to discharge the numerous liens existing against the property at the time the conveyance was made,*" has, we submit, no force as a reason for rejecting appellant's claim of lien inasmuch as such moneys, if so used, were replaced by the property itself and the property is to that extent subject to their claims. The appellant's claim of lien attaches only for the balance of the whole purchase price of the property in question for which no money or security has been paid or given other than the two promissory notes aggregating the sum of Nineteen Thousand (19,000) Dollars.

In this connection, we quote as follows, viz.:

> "The principle upon which Courts of equity have proceeded in establishing these liens in the nature of a trust is, that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money. A third person having full knowledge that the estate has been so obtained ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty. It would otherwise happen that the purchaser might put another person into a position better than his own with full notice of all the facts.
>
> If the purchaser alleges that the lien does not exist for any reason in a particular case the burden is on him to show the circumstances which repel the presumption of its existence or rebut its equity." 4 Kent Comm. (11th Edn., 153 and cases); 2 Sugd. Vendors and Purchasers (8th Am. Edn., p. 376 and notes).

For the purpose of the argument—If appellant here is to be charged with knowledge of the general course of business of The Realty Union (being simply a vendor of real property at a fixed price), the general investors in The Realty Union certificates are *a fortiori* chargeable with such knowledge and are in the position of the third person mentioned in the above statement of the law. To give such investors the full benefit of the whole value of the property of appellant, having paid only one-half of such value, would, we submit, be "inequitable in the ex-

treme." There are no circumstances in the case at bar which repel the presumption of the existence of appellant's lien or rebut its equity.

The case of *Royal Con. Min. Co.* vs. *Royal Con. Mines,* 157 Cal. 737, upon which respondent herein will undoubtedly rely, differs essentially in its facts from the case at bar.

In the case cited the facts are that the vendor sold certain real property to one Kemp Van Ee in accordance with the terms of a written contract between them whereby Van Ee paid down a certain part of the purchase price in cash and was then to

> "proceed forthwith to incorporate a company in London under the Joint Stock Companies Acts of Great Britain, for the purpose of acquiring the aforesaid properties, and said company shall have a nominal capital of 250,000 shares of one pound each, of which 25,000 shares, at the par value, shall be reserved for the purpose of providing working capital for the said properties, and the balance of shares, namely, 225,000 shares, shall be issued fully paid up and be deposited in London with the Anglo-Californian Bank, Limited, as security for the payment of the balance of the purchase consideration of $400,000 for the said properties, and upon the allotment and deposit of said 225,000 shares, the property shall be duly and legally conveyed by the purchaser to the company to be formed as aforesaid to acquire the same, free from all incumbrances.

The agreement further provides that the balance of the purchase price, namely, three hundred and forty thousand dollars, 'shall be paid in the manner following, that is to say, an amount equal to eighty per cent of the net proceeds arising from the working of said mines shall be paid to the vendor monthly on or before thirty days after the time of each and every clean-up, and shall be credited as aforesaid on account of the purchase consideration; provided, however, that as sales are made of said 225,000 shares, or any part thereof, as herein provided, the purchaser shall pay only such proportion of said amount equal to said eighty per cent of said net proceeds as the number of shares remaining in said bank bears to the total of 225,000 shares.' The following paragraph provides that 'the purchaser, however, shall have the right from time to time to otherwise discharge so much of the purchase consideration as he may think fit by the sale of as many of the said 225,000 shares as he may think necessary or advisable, always provided that none of the said shares shall be sold for less than their par value, and that in any event, as the same may be sold, they may be withdrawn by the purchaser or released, as he shall direct, against a payment to said bank for account of said vendors of ninety per cent of the par value of said shares, to apply upon said purchase consideration.'

After the payment, however made, of the balance of the purchase price, all the shares remaining in the hands of the bank are to be delivered to the purchaser. The vendors agree in paragraph 8 that upon the payment of the sixty thousand dollars they will deposit with the Anglo-Californian Bank, Limited, in San Francisco, a good and sufficient deed convey-

ing to the purchaser, his nominee or nominees, satisfactory title to all of said properties free and clear of all encumbrances whatsoever, together with a letter of instructions authorizing and directing said bank to deliver such deed upon receiving from the Anglo-Californian Bank, Limited, in London, a cablegram to the effect that the said 225,000 shares have been deposited with the said bank in London to be dealt with in accordance with the terms of the contract. It is provided that until the payment of the balance of $350,000 the vendors may have a representative upon the properties, but that upon the payment of the $60,000, possession of the properties is to be turned over to the purchaser. By the terms of paragraph 11 it is agreed that if the whole purchase consideration shall not have been paid at the expiration of four years 'then the balance of shares remaining in said bank shall, at such time thereafter as may be determined by said vendors, be divided between vendors and purchaser so that the purchaser receive such proportion of said shares as the whole amount of money paid by him hereunder bears to the entire amount of said purchase consideration; and the vendors shall receive the balance of shares in satisfaction of the purchaser's covenant to purchase.' The agreement further provides that it is to be binding upon and inure in favor of the heirs, representatives, successors, and assigns of the respective parties."

In the course of its opinion the Court says (page 747 of the Report):

"The respondents point to various elements of the transaction to support the contention that the plaintiff waived any lien. Without considering separately such arguments as that

the plaintiff took security or that the contract did not make the vendee liable for any liquidated purchase price measurable in terms of money, we have no hesitation in declaring our conviction that the contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties. That scheme, briefly stated, was this: The mines, owned by plaintiff, were to be conveyed, free and clear of encumbrance, to Van Ee. Van Ee was to form a corporation, and to transfer the properties, likewise unencumbered, to it. Ninety per cent of the shares of stock of such corporation were to be deposited in a bank, to be dealt with in a given manner. These shares were to be subjected to sale by the vendee or his associates, but a stated proportion of the sum realized on any sales was to go to the plaintiff in satisfaction of the consideration stated in the agreement. Similar provision was made with reference to a percentage of the proceeds arising from the operation of the mines by the vendee or his assigns. The number of shares to be deposited was 225,000, of the par value of one pound each. Sales of these shares were to be made at not less than their par value. In other words, the agreement contemplated that a title apparently free and unencumbered should be conveyed to a corporation which should, upon the basis of such title, issue and sell its shares to an amount exceeding a million dollars. The plan called for a nominal capitalization of about three times the price which plaintiff was willing to take for its properties, and provided that the shares should be sold to the public at a rate which would bring in an amount equal to or exceeding their face value. What may fairly be supposed to have been in the contemplation of the parties to

this agreement? Did the plaintiff and Van Ee intend to sell to prospective shareholders, at this price, an interest in a property which was subject to a paramount, but unrecorded, lien for $340,000, or did they propose to offer at par, shares in a corporation owning a clear title to the property? A reading of the agreement leaves no doubt that this question must be answered by saying that no secret lien in favor of the original vendor was intended to be retained. *In re Brentwood Brick & Coal Co.*, L. R. 4 Ch. Div. 562, was a case in which property was conveyed to a corporation for a consideration of six thousand pounds, to be paid by the payment to the vendor of fifty per cent of all money received by the company on the sales of shares, and a like fifty per cent of all money by way of capital to be at any time borrowed by the company, until the six thousand pounds should be paid. The transaction was held to be such as to exclude the idea of the retention of a vendor's lien. Referring to the provision for payment out of proceeds of shares sold or money borrowed, James, L. J., said: 'To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property.' The reasoning applies with equal force to the provision here for the sale of 225,000 shares at not less than their par value. Neither the plaintiff nor Van Ee could have considered it feasible to market at par any part of an issue of 225,000 one-pound shares of a corporation owning no assets beyond an equity of redemption (worth, perhaps, $60,000) in a property subject to a lien of $340,000. Again, the covenant that the plaintiff's conveyance to Van Ee, and his

subsequent transfer to the British corporation should be free and clear of encumbrances excludes the idea that a title subject to a lien in favor of the plaintiff was to be retained. It is true that in *Slide & Spur Gold Mines* vs. *Seymour,* 154 U. S. 509 (14 Sup. Ct. 842), it was held that a somewhat similar covenant was to be construed as referring 'to prior charges and encumbrances' and not to 'any which arise out of the conveyance itself.' But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free of encumbrances the restricted meaning applied to the Slide & Spur case, the vendor's lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of encumbrance.

But apart from this somewhat technical consideration, we prefer to rest our conclusion on the broader ground that the whole scope of this agreement, differing materially from that in the Slide & Spur case, is such as to make the existence of a vendor's lien inconsistent with the proper execution of the plan agreed upon."

The gist of the case cited is the absolute agreement between vendor and the original purchaser that the holding company should be formed to operate the property and that the shares of such company should be dealt in to secure the payment of the

balance of the purchase price and that the vendor should deed the property to the original purchaser free and clear of all incumbrances to this end.

We submit that there is no similarity between this case and the case at bar. The sale in the case at bar was an out and out transaction between appellant and The Realty Union without reference to another company or corporation or shares of stock or security of any kind. The fact that conveyances from appellant and Wallace were made to Mr. Roosevelt Johnson and to a Mr. Caro Mills in the first instance is of no significance. It is admitted on all sides that Mr. Johnson and Mr. Mills were acting directly as agents of The Realty Union and reconveyed the property in question almost immediately to The Realty Union.

In the case of *Slide & Spur Mines* vs. *Seymour,* 153 U. S. 509 (14 Sup. Ct. Rep. 842), Mr. Justice Brewer, in delivering the opinion of the Court, says:

> "It is not questioned in this case that a large part of the money consideration for the sale of these mines remains still unpaid; and the defendant is in the attitude of one who, admitting that the vendors have not received the money for which they sold the land, nevertheless insists upon retaining the property, discharged of any obligation for its payment. Its contention is that the plaintiffs sold to Haldeman, and that Haldeman sold to it, and that inasmuch as the terms of the original proposition of October 19, 1886, were not complied with, a new agreement was made on August 18,

with, a new agreement was made on August 18, title 'free from all charges and incumbrances,' and to rely for their security upon a portion of the stock of the grantee deposited with one of its charges and incumbrances obviously refers to prior charges and incumbrances, and does not exclude any which arise out of the conveyance itself. It means simply that the grantors shall have removed all burdens which rested upon the property prior to the time of making their deed, and that the deed shall pass the title perfect and unincumbered, but not that the grantee shall take it free from all obligations of payment, or discharged from the lien for the purchase price which rests upon real estate until such price is paid. The language of the covenants in the deed is in harmony with this thought; for after the covenant of seisin, and of the right to sell, follows one that the premises 'are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever.' It will be noticed that this agreement was not between the grantors and a third party, who was seeking to accomplish, with profit to himself, a sale from the plaintiffs to the defendant, at the price they demanded, and who was seeking to utilize the stock of the defendant in securing money for the cash part of the consideration. There is no presumption from the delivery of the deed that the plaintiffs intended to waive their lien for the purchase money. Indeed, it is characteristic of a vendor's lien, as distinguished from a contract lien, that it arises upon

a transfer of title. It is a doctrine of equitable jurisprudence which says that land, which is immovable, is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security."

Conclusion.

Appellant submits that she is entitled to her vendor's lien.

That there is no evidence, nor can there be any proper inference from the evidence indicating a waiver of such lien.

That the mere acceptance by her of the investment certificates of The Realty Union (to her simply promissory notes) as evidence of the existence of the indebtedness, cannot imply a waiver of such lien. Indeed, it is of significance in this connection that in the negotiations between appellant and The Realty Union appellant objected to the long intervals between payments of interest on the Union's indebtedness to her and exacted monthly payments of interest instead of the company's usual semi-annual payments (Transcript pp. 51-52). She made her own bargain with The Realty Union without regard to its general course of business.

Her whole purpose was simply to sell The Realty Union a certain piece of land and to make the best bargain for payment of principal and interest she possibly could. There is not the slightest indication in any of the evidence that she wished to become a participant in the general business of The Realty Union, to share in its prosperity or to suffer from its adversity.

Respectfully submitted,

W. F. Sullivan,
C. A. S. Frost,
Wm. M. Aydelotte,

Attorneys for Hattie Hardesty Chapman, Appellant.

Dated: San Francisco, Cal., February 11, 1918.